



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4113791/2021

5

Hearing held remotely 30 May to 1 June 2022

Deliberations 9 and 10 June 2021

10

**Employment Judge D Hoey
Members G Coyle and A Grant**

Ms L Palmer-Thomson

**Claimant
Represented by:
Ms Strain -
Solicitor**

15

Scottish Police Authority

**Respondent
Represented by:
Ms Mills -
Solicitor**

20

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that the claims raised by the claimant
25 are ill founded and are dismissed.

REASONS

1. By ET1 accepted on 22 December 2020 the claimant claimed that she had
been discriminated against by reason of the respondent's failure to comply
with its duty to make reasonable adjustments. ACAS early conciliation ran
30 from 13 October 2021 until 23 November 2021. The respondent disputed the
claims.

2. The hearing was conducted remotely via Cloud Video Platform (CVP) with the
claimant, the claimant's agent and the respondent's agent attending the entire
hearing, with witnesses attending as necessary, all being able to contribute to
35 the hearing fairly. Breaks were taken during the evidence to ensure the
parties were able to put all relevant questions to the witnesses. The Tribunal

was satisfied that the hearing had been conducted in a fair and appropriate manner, with the practice direction on remote hearings being followed, such that a decision could be made on the basis of the evidence led.

Case management

- 5 3. The parties had worked together to focus the issues in dispute and had provided a statement of agreed facts and a list of issues. These documents were refined by the final stage of the hearing.
4. A timetable for the hearing of evidence had been agreed and the parties worked together to assist the Tribunal in achieving the overriding objective, in
10 dealing with matters justly and fairly taking account of the issues, cost and proportionality. Each witness had provided a written witness statement with the evidence being appropriately challenged.

Issues to be determined

- 15 5. The issues to be determined were focussed. As the respondent conceded that the claimant was a disabled person at all material times, disability status was not an issue. Knowledge of disability and/or substantial disadvantage was also not raised as an issue.

Issues

- 20 a. By the submissions stage it was accepted that the respondent applied the provision, criterion or practice (PCP) to the claimant of requiring her to carry out the full duties of Scene Examiner role comprising attending major and minor crime scenes, attending court, conducting post mortems and office work.
- 25 b. It was also accepted by the submissions stage that the PCP put the claimant at a substantial disadvantage compared with someone without the claimant's disability, in that it placed her at greater risk of absence and dismissal.

- c. Did the respondent know, or could it reasonably have been expected to know, that the claimant was likely to be placed at that disadvantage was not raised as an issue (and was obvious from the evidence).
- d. What steps could have been taken to avoid the disadvantage? The claimant suggested that appointing her to one of three alternative roles, without competitive interview:
- 5
- i. Quality Lead with a closing date of 21 April 2021;
- ii. Scene Examination Lead with a closing date of 29 April 2021; and,
- iii. Quality Lead (a similar role to (i) above) with a closing date in
- 10 September 2021.
- e. Was it reasonable for the respondent to have taken those steps, and if so, when?
- f. Did any alleged failure to make a reasonable adjustment occur more than three months before the submission of the claim, adjusted in
- 15 respect of the Acas Early Conciliation period?
- g. If not, is it nevertheless just and equitable to decide the complaint?
- h. What remedy should be awarded in the event that the claim is successful?

Case management

- 20 6. The parties had agreed productions running to 307 pages with documents being inserted in the course of the hearing.
7. The Tribunal heard from the claimant, Mr Donnachie (Head of Quality), Ms Douglas (Director of Forensic Services) and Mr Scrimger (Head Scene Examiner).

Facts

- 25 8. The Tribunal is able to make the following findings of fact which it has done from the evidence submitted to it, both orally and in writing. The Tribunal only

5 makes findings that are necessary to determine the issues before it (and not in relation to all disputes that arose nor in relation to all the evidence led before the Tribunal nor all the agreed facts). Where there was a conflict in evidence, the conflict was resolved by considering the entire evidence and making a decision as to what was more likely than not to be the case but there were few material facts in dispute. The Tribunal was assisted by the parties reaching agreement, by the submissions stage, in respect of a large number of facts and is grateful to them for their assistance.

Background

10 9. The respondent is the Scottish Police Authority that provides support services to Police Scotland. The claimant commenced employment on 7 April 2003 as a Fingerprint Officer. On 10 May 2004 the claimant took up the post of Scenes of Crime Officer with a predecessor organisation.

Claimant's role – Scene examiner

15 10. On 2 April 2012 the claimant's job title was changed to Level 2 Scene Examiner. On 1 April 2013 the claimant's employment transferred to the Scottish Police Authority.

11. The role of a Level 2 Scene Examiner involved attending volume scenes (minor crime) and serious scenes (major and complex crimes).

20 12. In April 2016 the claimant attended a fatal road accident as part of her role and in July 2018 the claimant was diagnosed with post-traumatic stress disorder (PTSD).

25 13. In April 2019 the claimant applied for a position of a day shift Level 2 Scene Examiner. The claimant commenced this role in May 2019 having been given that role without going through a competitive interview process.

14. In the course of her role as a Level 2 Scene Examiner, the claimant did the following:

a) used the Q-Pulse Quality Management System.

- b) worked on training projects. For example, she was involved in designing, developing and delivering the fingerprint section of the new Level 1 Scene Examination training course for Scotland.
- 5 c) worked on validation projects, specifically the validation of fingerprint powders in which she researched and investigated the effectiveness of various fingerprint powders on fingerprints under varying conditions.
- d) undertook in-house training on the use of the Q-Pulse system.
- 10 e) worked as a consultant pool lecturer with Abertay University as part of their Forensic course.
- f) assisted in amending the operating procedure regarding the naming convention used to describe fingerprint lifts.

15 15. The claimant had experience using the quality management system as part of her role but did not have a specific certificate or qualification in quality management. She did not have experience of writing, approving or implementing quality standards (although she had some experience of writing parts of relevant procedures and worked with the quality management system daily). The claimant had no experience of creating and approving quality standards from inception to approval and beyond. The claimant did not have experience of approving or signing off amendments to procedures and the method development and validation was defined and implemented by others.

16. The Level 2 Scene Examiner role was a grade 7 role.

Claimant's absence

25 17. The claimant commenced ill health absence on 26 November 2019 and was referred to occupational health on 28 February 2020, 12 February 2021 and 12 May 2021. The claimant was assessed by occupational health on 16 April 2020, 25 March 2021 and 23 June 2021. The resulting reports referred to a variety of conditions being PTSD, fibromyalgia and chronic back pain.

18. In relation to the 12 February 2021 referral the report was received by the respondent on 22 April 2021. This report included an opinion the claimant was permanently unfit to carry out her current post as Level 2 Scene Examiner. It also stated that the claimant's psychologist was clear with the claimant that she should not go back to the job as a Level 2 Scene Examiner as it represented a "reasonably foreseeable risk/trigger for PTSD". She was not fit to carry out her normal duties.
19. The report noted that the physical symptoms from the fibromyalgia had increased and that the pain can be unforeseeable and inconsistent. The report noted that the claimant had applied for a number of roles and having heard nothing assumed she had been unsuccessful. These were jobs "outside her current field". The claimant had also intimated that her psychologist had been clear that they did not think she should go back to her current role as it represented a reasonably foreseeable risk in the context of her PTSD. The risk that arose was being presented with certain triggers when carrying out the role by way of an audio or visual nature.
20. The report stated that the claimant was medically fit for an appropriate type of work which could assist her rehabilitation. A phased return to work was recommended with an ultimate goal of full daytime hours. She was not fit for shift work.
21. The report noted that the claimant had found delivering training in the forensic field did not trigger her symptoms and she would be fit to deliver training in the field, albeit it was understood that there was insufficient available work in that field. The claimant was not fit for manual handling tasks nor to work predominately outdoors. A predominately sedentary role would be best.
22. The adjustments that had been put in place in the past were to remain, namely the claimant should not be exposed to triggering narratives particularly of an audio visual nature.
23. Following receipt of the occupational health report on 22 April 2021, it was reasonable for the respondent to conclude that the claimant was not fit for her Level 2 Scene Examiner's post.

24. During the claimant's absence there were a number of discussions that took place with the claimant to discuss managing the claimant's health and securing a suitable position given the challenges the claimant faced. The claimant and her line manager discussed how the claimant was feeling and what she believed she could do by way of work tasks. The claimant was advised that the intention was to identify another suitable role for the claimant consistent with the medical position and the claimant's position (and a role which would avoid placing the claimant at risk of facing the triggers).

Claimant applies for Quality Lead role

25. On 21 April 2021 the claimant had applied for the role of Quality Lead.

26. The role of Quality Lead reported to the Quality Manager and was at grade 7.

27. The purpose of the job was (a) manage the day-to-day provision and development on management systems in support of a national function and give advice and support relating to accreditation, validation and verification issues, (b) provide support to the Quality Manager and Head of Quality in cross functional quality initiatives and provide assurance relating to compliance to relevant standards and (c) assist in the development, implementation and co-ordination of the management system to provide an efficient and effective forensic service.

28. The essential criteria of the Quality Lead role were (1) Honours Degree or equivalent in scientific subject or equivalent professional experience; (2) Demonstrating SPA behavioural competencies at managerial level; and (3) Extensive relevant quality management system knowledge and experience.

29. The Quality Team within the respondent was small and tightly knit comprising head of quality, quality manager and 8 Quality Leads. The team worked together to ensure the respondent continued to achieve ISO 17025 accreditation which was essential to ensure the respondent continued to have a licence to operate. Ordinarily staff who joined the quality team acquired the relevant skills and experience from the wider market place such as pharmaceuticals or manufacturing (which are common areas that employ total

quality management processes). Typically colleagues who enter the quality team acquired their expertise from organisations that had developed processes in place.

- 5 30. The role of quality lead was specialist and different to all other positions in forensic services. The role required an in depth understanding of quality management systems, how to audit those systems and processes and how quality management systems operated and are implemented in practice. It can take a number of years working in a quality role to acquire the knowledge and expertise needed for the role. The respondent's team, as a close knit team, did not have the capacity to train individuals in the basic requirements for the role, which is why having extensive quality management system and knowledge was an essential requirement for the postholder.
- 10
- 15 31. The claimant had met 2 of the 3 essential requirements, namely that she had a degree or equivalent in scientific subject and that the claimant could demonstrate SPA behaviour competences at managerial level. She had not satisfied the third essential requirement, to have extensive relevant quality management system and knowledge.
- 20 32. The application form the claimant submitted contained the opportunity to evidence her suitability for the role. She set out the work within the quality management system which she carried out as part of her original role.
33. The respondent's policy was to put forward for interview disabled candidates if the essential criteria were met.
- 25 34. The respondent concluded that the claimant had not satisfied the third essential criterion for the role. In so concluding the respondent considered all the information the claimant had provided in her application form together with her career history in working with the respondent.
- 30 35. The respondent concluded from the information before them they the claimant did not meet all of the essential criteria for the role and so did not appoint the claimant to the Quality Lead Role (nor have a direct conversation with the claimant about the position).

36. The claimant did not have extensive quality management system knowledge and experience. The claimant did not have any prior experience in managing quality systems. Although as a Scene Examiner she had worked within a system to which quality management was applied she had no practical
5 experience of managing quality systems. The claimant did not have in depth knowledge of quality management systems nor practical experience of implementing such systems. A key requirement for quality lead was to be a point of expertise in relation to quality matters, including the achievement, maintenance and extension of the relevant accreditation. Experienced quality
10 professionals would ordinarily have experience of quality management techniques and tasks such as auditing, document control, validation and conducting root cause analysis of non-conforming work. The claimant did not have such in-depth experience. The claimant's experience was different.
37. This meant that in order meet the requirements of the Quality Lead role the
15 respondent would have to provide significant internal and external training. In order for the claimant to have acquired the essential skills needed for the role extensive training would require to have been provided to her. To provide the necessary training for the claimant to equip her with the essential skills would have had a real adverse impact upon the ability of the quality department to
20 meet its operational requirements. The quality department was a small team such that any one post being in training for a significant period would have a detrimental impact on the team to operate effectively.
38. Having one Quality Lead role in training for such a significant period posed a
25 significant risk to the respondent's ability to continue to achieve ISO accreditation. ISO17025 accreditation is the respondent's forensic service licence to operate. Failure to be accredited or for accreditation to be restricted would significantly impact or even cease the respondent's forensic science provision. All Quality Leads were vital to ensuring that the respondent continues to receive ISO17025 accreditation and that all work produced
30 complied with overarching management system requirements.
39. The claimant's position was the same in respect of both applications (in April and September 2021, which were for the same role and required the same

experience and knowledge. The claimant did not have the essential experience and knowledge necessary for either role.

40. Only those candidates who met the essential criteria progressed to interview and the successful candidates had extensive quality management knowledge and experience.

Claimant applies for Scene Examination Lead role

41. On 29 April 2021 the claimant applied for the role of Scene Examination Lead.
42. This role was at level 10 (which was 2 management levels higher than the claimant's then role).
43. The Scene Examination Lead role had the following main responsibilities:
- a. a full forensic service at volume and more complex scenes, employing best practice techniques, in order to assess, preserve, record and recover evidence so as to maximise the potential of forensic evidence or identification.
 - b. carrying out a supervisory role managing a team of Scene Examiners at major incidents; and
 - c. lead and manage various project groups to develop new services and innovations in conjunction with the senior management team.
44. Other duties included:
- d. To act as a national lead with responsibility for ensuring the technical validity and standards in scene examination and to undertake the strategic development of the function
 - e. To identify opportunities, advise and make recommendations to the Operations Managers and wider management team regarding scene examination
 - f. To contribute to the scene examination development strategy by working with the management team.

- g. To represent forensics services nationally and internationally to identify opportunities to develop the service in line with the business plan
- 5 h. Single point of contact nationally for guidance and advice both internally and externally
- i. Lead and manage various project groups to develop new services and innovations in conjunction with senior management team.
- j. Consult with other scientific leads to establish any cross functional opportunities to identify best practise and promote innovation to the benefit of forensic services
- 10 k. Prepare reports and make recommendations around maximising available opportunities to improved effectiveness and efficiencies at national and local level
- l. To lead the development of existing and new training programmes in accordance with specific specialist projects and the strategic direction of scene examination
- 15 m. Mentor scene examination trainee staff and assist in their development towards progression to fully operational Scene Examiners
- n. Assist in the delivery of scene examination awareness training to other business areas and external agencies when required
- 20 o. To keep up to date on developments in scene examination field through attendance of CPD courses to provide support to CPD of Scene Examiners in alignment with training and development manager
- 25 p. Attend and contribute to various internal and external meetings and scientific advisory groups.

45. The post holder required to work at major and minor crime scenes both volume and serious types of crime scene. The environment in which the role

sits is surrounded by telephone and airwave communication regarding serious crime and office discussion covers scene detail and strategy. The post holder also required to critically review major incident detail and assess detailed documentation and images to determine whether appropriate steps were taken in the investigation and examination of a crime. Such documentation could involve stressful situations.

46. The role also required the postholder to design and implement training materials and validation studies covering various crime scene scenarios.
47. It would not be possible for the role to be such as to limit the post holder's exposure given the nature of the role and context. At the time when the role was available the claimant was unable to attend certain major or minor crime scenes due to triggers that could significantly affect the claimant.
48. The essential criteria for the role were educated to degree level or equivalent in a forensic related discipline, excellent interpersonal and communication skills and 5 special aptitudes, namely track record of successfully meeting key service objectives, track record of successful project management (evidenced against a series of key deliverables), knowledge of criminal justice partner organisations and sensitives required, knowledge of forensic services and detailed knowledge of EMS.
49. The respondent has a number of "Lead" roles in their organisation which usually involved development of new processes in their specialist areas including new and innovative ways to do things. It was a fundamental part of any lead role that the individual continued to practice in their speciality since they were required to continue to identify new processes and innovations in their field (and need to be working in the field to do so). Leads require to regularly practice in their field to be and remain a competent expert.
50. The Scene Examination Lead role required the post holder to attend and work all types of crime scenes including major and minor crime scenes, which can include major incidents and complex examinations (which can be distressing and involve difficult issues and matters).

51. The role required some training duties and the claimant had experience in training and had worked as consultant pool lecturer with a university on their forensic science course. The claimant had also collaborated with other teams in her work. The claimant also had some experience of validation projects which were finalised by a Scene Examination Lead. The claimant had designed, developed and delivered the fingerprint section of the new level 1 scene examination training course in Scotland from 2018 until her absence from work. The claimant had also independently undertaken a qualification in project management which was a 2 week course.
52. The respondent considered the claimant's application and applied its policy, which would have been to have forwarded the claimant for interview had the claimant shown she met the essential criteria for the role.
53. The respondent considered the claimant's application and job history in reviewing her application for the role. The respondent concluded that the claimant had made "no effective mention of projects" in her application and had been "unable to meet requirements of post even with additional time and training". The claimant's application was not progressed.
54. The role required a full forensic service, including attendance at major and minor crime scenes. The respondent was concerned that exposing the claimant to such situations created risk, given occupational health reports in respect of the claimant advised that the claimant should not be subjected to serious crime and, if possible, redeployed outwith the scenes department.
55. The respondent considered the experience the claimant had and was not satisfied the claimant had relevant project management experience. Scene Examiners do not normally carry out project work to the same level as that required for Scene Examination Lead.
56. At the time of consideration of this role, the medical position was such that the claimant remained permanently unfit for her then current post (of Scene Examiner) given the triggers in respect of her PTSD. She was not fit to undertake manual handling tasks or to work predominately outdoors. It was important that the claimant not be exposed to triggering narratives.

57. The successful candidate had project experience from a previous career.
58. The claimant was not referred to occupational health to specifically assess whether this role was suitable for her and a decision was made on the basis of the information before the respondent at the time.

5 **Respondent confirms claimant's applications were unsuccessful**

59. On 9 June 2021 the claimant was advised that she had been unsuccessful in her applications for the Quality Lead Role (from April) and the Scene Examination Lead Role. Later that day the claimant contacted HR to say that she disagreed with the decision not to proceed the claimant to interview for both roles and said that she was not prepared to accept the decision. She believed that she was deserving of an interview for both posts given her position. The claimant believed the respondent would reconsider her for both roles given the issues that had been raised on her behalf.

Claimant escalates matter

- 15 60. On 10 June 2021 the claimant was told by the HR representative that she had referred matters to the People Operations Manager "requesting that he has further dialogue with recruitment in respect of your situation." She said she had impressed upon him that this was a matter of urgency requiring resolution prior to the consideration of other candidates by the hiring manager.

20 **Further occupational health input received**

61. The claimant was assessed by occupational health on 23 June 2021 following a referral from 12 May 2021 and a report was produced.
62. This report stated that the claimant continued to engage with appropriate psychological and pharmacological treatment and to deploy appropriate measures herself with beneficial impact. The claimant noted she continued to see her clinical psychologist and that her PTSD symptoms had become "much better". Her main concerns were job security and financial issues.
- 25 63. The author considered that the claimant was medically fit for appropriate work, which followed the conclusion from the report in March 2021. The optimal

position was permanent redeployment to a role outwith her current crime scene sector. If that were not possible then a modified role within the crime scene sector in training/research/governance areas would be considered be suitable. Finally if that in turn was not possible, an option would be to consider returning to a Scene Examiner role on a trial basis. The author's concern with such a move was how such a move would impact upon the claimant and the claimant's clinical psychologist's opinion would be required to assess that.

Claimant unhappy as to approach adopted

64. On 13 July 2021 the claimant contacted the recruitment department and explained that she was unhappy with how she had been treated and wanted a full investigation. She believed the current system did not work and was not fair to her as a disabled person.

Respondent responds to claimant's concerns

65. On 15 July 2021 the claimant was advised that if a disabled candidate had met the essential competences for a role they would be interviewed. The claimant was told there would be no reconsideration in respect of her 2 applications in April and the position adopted was final.

Capability process begins

66. Around 22 April 2021 the claimant was advised that a redeployment process would commence which resulted in there being a 12 week process to find another role which failing a capability process would begin.

67. On or around 29 July 2021 the claimant was informed that if there were no available roles for her ill health retirement would have to be considered, which failing dismissal.

Claimant given temporary project work

68. In August 2021 the claimant was offered and accepted temporary project work as part of a phased return to work. She returned to work on 23 August 2021. Following this, as part of a phased return, the claimant worked reduced hours

(i.e. less than her contractual 35 hours per week). The claimant's salary was preserved despite the reduced hours.

Claimant applies for another Quality Lead position

- 5 69. In or around September 2021 the claimant applied for the role of Quality Lead which was similar to the role above for which the claimant had been unsuccessful.
- 10 70. The respondent considered the claimant's application together with her experience. The respondent concluded that the claimant did not have the essential skills needed for the role and as such the respondent concluded that the claimant was not suitable for the role of Quality Lead. The claimant's skills and experience had not materially changed since her April application.
- 15 71. On 25 October 2021 the claimant was told the following: "The Quality Lead is responsible for advising staff and management of compliance of our processes and procedures to the requirements of our Quality Management System and the requirements of accreditation to external internal standards such as ISO17025. Essentially, this is our licence to operate and failure to be accredited in some areas would significantly impact on or stop forensic science provision. This is such a significant risk that it would not be a role in which an extended internal and external training programme could be put in place without having a real impact on the quality of forensic science provision. Generally, quality lead skills are developed in the wider marketplace such as pharmaceuticals, manufacturing processes where total quality management approaches are in place. It is not a natural career path for scientific staff to develop into and we tend to recruit these skills into the organisation. We have 20 a limited and small team of Quality Leads and, as such, any one post being in training for a significant period would have a detrimental impact on the ability of the team to operate effectively."
- 25 72. The Quality Lead Role was of particular significance given both the importance of providing quality forensic science services and the need to secure and maintain appropriate accreditation for the respondent. A failure to 30

secure such accreditation could materially impact on, or even stop, the respondent's ability to provide forensic science services.

73. The claimant did not have extensive relevant quality management system knowledge and experience. As a Level 2 Scene Examiner, the claimant had experience of working within the respondent's quality management system. That involved following process and procedure rather than implementing and development of a quality management system. The claimant did not have an in-depth knowledge of quality management systems nor any practical experience of implementing such systems.
74. The claimant was not referred to occupational health to specifically assess whether this role was suitable for her and a decision was made on the basis of the information before the respondent at the time.
75. The respondent did not have a direct conversation with the claimant about this role and assessed her suitability by reviewing her application and the suitability and experience she had set out and in light of the claimant's experience in her work with the respondent.

Respondent provides claimant with an alternative permanent role

76. In or around November 2021 an alternative permanent role of Mark Enhancement Recovery Officer was identified for the claimant. On 28 January 2022 occupational health confirmed that this was a suitable role for the claimant and the claimant commenced a 12 week trial period on 28 February 2022. The claimant's salary did not change, the role being at grade 7.
77. The claimant required retraining to carry out this role which was ongoing.
78. The claimant was not required to attend crime scenes for the role of Mark Enhancement Recovery Officer, which was an adjustment made for the claimant in respect of this role.
79. The claimant remained in employment with the respondent.

Observations on the evidence

80. Broadly speaking the Tribunal found that each of the witnesses did their best to recall events and provide credible and reliable evidence. On occasion recollections were found to be incorrect or some errors were made.
- 5 81. The claimant was upset that a position had not been found for her during the times in question and she wished to focus upon her perception that the Quality Lead and Scene Examination Lead roles that were suitable for her. She believed that her experience was sufficient but did not have full visibility or understanding as to the objective position as to the essential requirements of the role, which the claimant did not possess. The claimant's health position
10 had changed by the time of the Hearing and her focus was often upon how she had improved by the date of the Hearing, whereas the key focus was the information available to the respondent at the time in question.
82. Mr Dunnachie and Ms Douglas both gave clear and cogent evidence as to the
15 requirements of the Quality Lead role. The nature of the role and team had evolved over time and the roles were specialist, often relying upon those who had gained specific relevant experience from outside the respondent's organisation given the nature of the role. The Tribunal found their evidence compelling and that the claimant did not, objectively viewed, have each of the
20 essential skills that would have resulted in giving the claimant the quality lead role a reasonable step to take to remove the disadvantage. The role required skills that the claimant had not obtained over her career. That was not a criticism of the claimant but a fact given the type of work involved. The claimant had substantial experience of using the system but not in its
25 development, application and management which was a key requirement for the role. That was not something that had been fully explained to the claimant and she did not have a clear understanding as to the fundamentally different nature of the role (from that as understood by the claimant).
83. The Tribunal did not consider it accurate to say (as the claimant's agent did)
30 that Mr Dunnachie (or indeed any of the respondent's witnesses) accepted that had they spoken to the claimant they would have been satisfied she had

the essential skills for the roles in question. Each of the respondent's witnesses was clear in stating that the information presented showed that the claimant did *not* have all the essential skills for the role. The Tribunal assessed that position from the evidence presented and considered that to be a fair and accurate summary. The Tribunal accepted that evidence from the respondent's witnesses. Even if the claimant had omitted important examples of her experience in the forms she completed, the examples she was able to raise which she had not included did not demonstrate that she had the essential skills that would have rendered it reasonable to have given the claimant the roles in question. The issue for this Tribunal was not how the respondent's dealt with the process but rather whether or not it was a reasonable step to have given the claimant the roles relied upon.

84. The Tribunal considered that Mr Scrimger did his best in recollecting matters, One of the difficulties was that the persons who had made the decision with regard to the Scene Examination lead role were unable to give evidence. Nevertheless and importantly Mr Scrimger had discussed matters with the individuals who made the decision at the time (and he was their line manger as Head of Scene Examination) and he was able to provide insight into that rationale. As he had not been fully involved in the process, he struggled on occasion to recollect precisely what had happened and was a little unclear in some areas. The Tribunal considered his evidence carefully together with the documents that were produced and the claimant's evidence.

85. Mr Scrimger had 34 years experience of working in Scottish forensic scene and clearly fully understood the role and functions of the department and the role and was able to give clear evidence as to its requirements. Having joined the respondent in 1988 he was well placed to speak about the requirements of the role. The Tribunal was able to carefully consider the role in question and assess that as against the claimant's evidence and information available at the time in question.

86. Although the claimant believed the role would have been suitable for her, having carefully considered the evidence the Tribunal was satisfied the position set out by Mr Scrimger was accurate and the Tribunal accepted his

evidence in that regard. The role from many angles (both in terms of attendance at scenes, working with colleagues and reviewing materials) dealt with serious crime which were key requirements. The claimant would require to attend all types of crime scenes and deal with all types of issues arising from such work. In her witness statement the claimant accepted she would not be able to attend all crime scenes. It would not have been reasonable to have restricted the nature of the work given the role in question.

Law

Burden of proof

10 87. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides as follows:

“(2) *If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.*

15 (3) *But subsection (2) does not apply if A shows that A did not contravene the provision.”*

88. The section goes on to make it clear that a reference to the Court includes an Employment Tribunal.

89. It is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

25 90. In **Hewage v Grampian Health Board** 2012 IRLR 870 the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in **Igen Limited v Wong** 2005 ICR 931 and was supplemented in **Madarassy v Nomura International plc** 2007 ICR 867. Although the concept of the shifting burden of proof involves a two stage process, that analysis should only be

conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question.

- 5 91. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.
- 10 92. It was confirmed by Lord Justice Mummery in the Court of Appeal that it is not always necessary to address the two-stage test sequentially (see **Brown v London Borough of Croydon** 2007 ICR 909). Although it would normally be good practice to apply the two-stage test, it is not an error of law for a tribunal to proceed straight to the second stage in cases where this does not prejudice the claimant. In that case, far from prejudicing the claimant, the approach had relieved him of the obligation to establish a *prima facie* case.
- 15 93. Thus in direct discrimination cases the tribunal can examine whether or not the treatment is inextricably linked with the reason why such treatment has been meted out to the claimant. If such a link is apparent, the Tribunal might first consider whether or not it can make a positive finding as to the reason, in which case it will not need to apply the shifting burden of proof rule.
- 20 94. The Tribunal was also able to take into account the recent Employment Appeal Tribunal decisions in this regard in **Field v Steve Pye & Co** EAT2021-000357 and **Klonowska v Falck** EAT-2020-000901.
- 25 95. In **Project Management Institute v Latif** [2007] IRLR 579, Mr Justice Elias, approved the guidance on the application of the burden of proof on reasonable adjustments cases, stating at paragraphs 54 of the judgment: “The key point identified therein is that the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently
- 30 reasonable adjustment which could be made.”

Time limits

96. The time limit for Equality Act claims appears in section 123 as follows:

“(1) *Proceedings on a complaint within section 120 may not be brought after the end of –*

5 (a) *the period of three months starting with the date of the act to which the complaint relates, or*

(b) *such other period as the Employment Tribunal thinks just and equitable ...*

(2) *...*

10 (3) *For the purposes of this section –*

(a) *conduct extending over a period is to be treated as done at the end of the period;*

(b) *failure to do something is to be treated as occurring when the person in question decided on it”.*

15 97. With regard to a failure to comply with the duty to make reasonable adjustments and time limits, a difficult issue is whether a failure to make adjustments a continuing act or is it an omission. In **Humphries v Chevler Packaging Ltd** EAT 0224/06 the Employment Appeal Tribunal confirmed that a failure to act is an omission and that time begins to run when an employer
20 decides not to make the reasonable adjustment.

98. The Court of Appeal provided further guidance in **Kingston upon Hull City Council v Matuszowicz** 2009 ICR 1170. The Court of Appeal noted that, for the purposes of claims where the employer was not deliberately failing to comply with the duty, and the omission was due to lack of diligence or
25 competence or any reason other than conscious refusal, it is to be treated as having decided upon the omission at what is in one sense an artificial date. In the absence of evidence as to when the omission was decided upon, the legislation provides two alternatives for defining that point in section 123. The

first is when the person does an act inconsistent with doing the omitted act. The second presupposes that the person in question has carried on for a time without doing anything inconsistent with doing the omitted act, and it then requires consideration of the period within which the respondent might reasonably have been expected do the omitted act if it was to be done. In terms of the duty to make reasonable adjustments, that requires an inquiry as to when, if the employer had been acting reasonably, it would have made the reasonable adjustments. That is not at all the same as inquiring whether the employer did in fact decide upon doing it at that time.

5
10 99. Sedley LJ stated that: '*claimants and their advisers need to be prepared, once a potentially discriminatory omission has been brought to the employer's attention, to issue proceedings sooner rather than later unless an express agreement is obtained that no point will be taken on time for as long as it takes to address the alleged omission*'.

15 100. In determining when the period expired within which the employer might reasonably have been expected to make an adjustment, the Tribunal should have regard to the facts as they would reasonably have appeared to the claimant, including what the claimant was told by his or her employer.

20 101. In **Abertawe Bro Morgannwg University Local Health Board v Morgan** 2018 ICR 1194, the claimant brought a claim of failure to make a reasonable adjustment based on a failure to redeploy her to another role. The Tribunal considered that the Board would reasonably have been expected to have made the adjustment by 1 August 2011. This was when time began to run.

25 102. Before the Court of Appeal, the Board argued that this meant that it could not have been in breach of duty before that date but the Court disagreed. Not all time limits are fixed by reference to the date on which a cause of action accrued. In the case of reasonable adjustments, the duty arises as soon as the employer is able to take steps which it is reasonable for it to take to avoid the relevant disadvantage. In that case, the situation arose around April 2011.
30 However, the Court observed that if time for submitting a claim began to run at that date, the claimant might be unfairly prejudiced. He or she might

reasonably believe that the employer was taking steps to address the disadvantage, when in fact the employer was doing nothing. By the time it became (or should have become) apparent to the claimant that the employer was doing nothing, the time limit for bringing proceedings might have expired.

5 Accordingly, for the purposes of the time limit, the period within which the employer might reasonably have been expected to comply had to be determined in the light of what the claimant reasonably knew. In that case the Tribunal found that by June/July 2011 it should have been reasonably clear to the claimant that the Board was not looking for suitable alternative roles for her. Although the Tribunal was generous in finding that time did not begin to run until 1 August, it could not be said that this conclusion was not open to it.

10

103. Legatt LJ set out the legal principles at paragraph 14 onwards of the judgment which we apply. We have also taken into account Richardson HHJ's judgment in **Watkins v HSBC** [2018] IRLR 1015. That judgment makes clear that failure to comply with the duty to make reasonable adjustments ought to be considered a continuing failure (rather than an act extending over a period) such that section 123(3) and (4) should be applied (see paragraph 48).

15

104. The Tribunal has also considered and applied the reasoning of Lord Fairley who examined this issue in **Kerr v Fife Council** UKEATS/0022/20/SH. He emphasised the injustice of determining from the employer's point of view, for example, the period in which respondent might reasonably have been expected to make an adjustment. The claimant might not be aware that the respondent is doing nothing about a request for an adjustment, but instead claimant might be thinking that the respondent is still considering the proposal or working towards implementing the adjustment. If it were the case that the Tribunal could determine that it would have been reasonable to expect the employer to make the adjustment within one month of the request, and time should therefore run from then, the claim could be out of time before the employee appreciated that the employer was doing nothing about her request for adjustments. The same applies to the "inconsistent act" default under section 123(4); It must be what the employee would or should have

20

25

30

appreciated as an inconsistent act, not what the Tribunal determines would have been an inconsistent act from the employer's perspective.

Extending the time limit

5 105. Section 123 of the Equality Act 2010 requires that any complaint of discrimination within the Act must be brought within three months of the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable. When considering whether it is just and equitable to hear a claim notwithstanding that it has not been brought within the requisite three month time period, the Employment Appeal Tribunal has said in the case of **Chohan v Derby Law Centre** 2004 IRLR 685 that a Tribunal should have regard to the Limitation Act 1980 checklist as modified in the case of **British Coal Corporation v Keeble** 1997 IRLR 336 which is as follows:

- 15 - The Tribunal should have regard to the prejudice to each party.
- The Tribunal should have regard to all the circumstances of the case which would include:
 - o Length and reason for any delay
 - o The extent to which cogency of evidence is likely to be affected
 - o The cooperation of the respondent in the provision of information requested
 - 20 o The promptness with which the claimant acted once he knew of facts giving rise to the cause of action
 - o Steps taken by the claimant to obtain advice once he knew of the possibility of taking action.

25 106. In **Abertawe v Morgan** 2018 IRLR 1050 the Court of Appeal clarified that there was no requirement to apply this or any other checklist under the wide discretion afforded to Tribunals by section 123(1). The only requirement is not to leave a significant factor out of account. Further, there is no requirement that the Tribunal must be satisfied that there was a good reason for any delay;

the absence of a reason or the nature of the reason are factors to take into account. A key issue is whether a fair hearing can take place.

107. In the case of **Robertson v Bexley Community Services** 2003 IRLR 434 the Court of Appeal stated that time limits are exercised strictly in employment law and there is no presumption, when exercising discretion on the just and equitable question, that time should be extended. Nevertheless, this is a matter which is in the Tribunal's discretion. That has to be tempered with the comments of the Court of Appeal in **Chief Constable of Lincolnshire v Caston** 2010 IRLR 327 where it was observed that although time limits are to be enforced strictly, Tribunals have wide discretion.
108. In **Rathakrishnan v Pizza Express (Restaurants) Ltd** 2016 ICR 283 the Employment Appeal Tribunal held that in that case the balance of prejudice and potential merits of the reasonable adjustments claim were both relevant considerations and it was wrong of the tribunal not to weigh those factors in the balance before reaching its conclusion on whether to extend time.
109. Finally the Tribunal considered and applied the judgment of Underhill LJ in **Lowri Beck Services v Brophy** 2019 EWCA Civ 2490 and in particular at paragraph 14. Ultimately the Tribunal requires to make a judicial assessment from all the facts to determine whether to allow the claims to proceed and in particular assess the respective prejudice.

Impact of early conciliation on time limits

110. Section 140B of the Equality Act 2010 extends the time limit for lodging a claim to take account of ACAS early conciliation. In most cases (including the current case) a claimant is required contact ACAS prior to presenting a claim to the Tribunal (to obtain an early conciliation certificate). For the purpose of time limits, time stops running from the day following the date the matter was referred to ACAS to, and including, the date a certificate is issued by ACAS.
111. Further, and sequentially, if the original time limit would have expired during the period beginning with the date early conciliation began and ending one

month after the date the claimant receives (or is deemed to receive) the certificate, the time limit expires at the end of that period.

112. Early conciliation only applies where the claim is commenced before the statutory time limit has expired.

5 *Reasonable adjustments*

113. Section 39(5) of the Equality Act 2010 provides that a duty to make reasonable adjustments applies to an employer. Further provisions about that duty appear in sections 20 and 21 and Schedule 8. Paragraph 20 of Schedule 8 states: "A is not subject to a duty to make reasonable adjustments if A does
10 not know, and could not reasonably be expected to know, ... that an interested disabled person has a disability and is likely to be placed at the disadvantage". This is considered in chapter 6 of the Code.

114. Section 20, so far as relevant, provides as follows –

- 15 (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
- (2) The duty comprises the following three requirements.
- 20 (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
- 25 (4) The second requirement is a requirement where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled to take such steps as it is reasonable to have to take to avoid the disadvantage.

- (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.
- 5
115. Failure to comply with the duty to make reasonable adjustments is dealt with in section 21 which, so far as relevant, provides – “(1) A failure to comply with the first...requirement is a failure to comply with a duty to make reasonable adjustments. (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.”
- 10
116. The importance of a Tribunal going through each of the constituent parts of section 20 was emphasised by the Employment Appeal Tribunal in **Environment Agency v Rowan** 2008 ICR 218 and reinforced in **Royal Bank of Scotland v Ashton** 2011 ICR 632.
- 15
117. As to whether a “provision, criterion or practice” (“PCP”) can be identified, the Code at paragraph 6.10 says the phrase is not defined by the Act but “should be construed widely so as to include for example any formal or informal policy, rules, practices, arrangements or qualifications including one off decisions and actions”. The question of what will amount to a PCP was considered by the Employment Appeal Tribunal in **Nottingham City v Harvey** UKEAT/0032/12 and **Ishola v Transport for London** [2020] EWCA Civ 11.
- 20
118. For the duty to arise, the employee must be subjected to “substantial disadvantage in comparison to a person who is not disabled” and with reference to whether a disadvantage resulting from a provision, criterion or practice is substantial, section 212(1) defines “substantial” as being “more than minor or trivial”. The question is whether the PCP has the effect of disadvantaging the disabled person more than trivially in comparison to those who do not have the disability (**Sheikholeslami v University of Edinburgh**, 2018 IRLR 1090).
- 25
119. The obligation to take such steps as it is reasonable to have to take to avoid the disadvantage is one in respect of which the Code provides considerable
- 30

assistance, not least the passages beginning at paragraph 6.23 onwards. A list of factors which might be taken into account appears at paragraph 6.28 and includes the practicability of the step, the financial and other costs of making the adjustment and the extent of any disruption caused, the extent of the employer's financial or other resources and the type/size of the employer.

120. Paragraph 6.29 makes clear that ultimately the test of the reasonableness of any step is an objective one depending on the circumstances of the case. It is for the Tribunal to assess this issue. Examples of reasonable adjustments in practice appear from paragraph 6.32 onwards. Examples include relocating minor or subsidiary duties to another, considering whether a suitable alternative post is available where no reasonable adjustment would enable the worker to continue doing the current job (even if such a post involves retraining or transfer to a position on a higher grade). At paragraph 16.51 it is noted that some employers offer a guaranteed interview scheme where a disabled candidate is interviewed automatically if they demonstrate they meet the minimum criteria for the role.

121. Paragraph 6.2 states: "The duty to make reasonable adjustments is a cornerstone of the Act and requires employers to take positive action to ensure that disabled people can access and progress in employment. This goes beyond simply avoiding treating disabled workers, job applicants and potential job applicants unfavourably and means taking additional steps to which non-disabled workers and applicants are not entitled."

122. **Smith v Churchill Stairlifts plc** 2005 EWCA Civ 1220 confirms that the test of reasonableness is an objective one and it is not necessarily met by an employer showing that he believed that the making of the adjustment would be too disruptive or costly (paragraph 45).

123. Paragraph 6.33 of the Code advises that transferring a disabled worker to fill an existing vacancy can be a reasonable adjustment, as was found in **Archibald v Fife Council** 2004 ICR 954.

124. Whilst a failure to consider adjustments properly is not a failure to comply with the duty itself, a failure to carry out such an assessment may be of evidential

significance; as Elias P put it in **Project Management Institute v Latif** [2007] IRLR 579: “35. ... a failure to carry out a proper assessment, although it is not a breach of the duty of reasonable adjustment in its own right, may well result in a respondent failing to make adjustments which he ought reasonably to make. A respondent, be it an employer or qualifying body, cannot rely on that omission as a shield to justify a failure to make a reasonable adjustment which a proper assessment would have identified.

Submissions

125. Both parties produced written submissions and the parties were able to comment upon each other submissions and answer questions from the Tribunal. The Tribunal deals with the parties submissions as relevant below, but does not repeat them in detail. The parties’ full submissions were taken into account in reaching a unanimous decision.

Decision and reasons

126. The Tribunal spent time considering the evidence that had been led, both in writing and orally and the full submissions of both parties and was able to reach a unanimous decision. The Tribunal deals with issues arising in turn referring to the parties’ submissions where appropriate.

Time bar

127. The first issue to determine is the issue of time bar. The respondent accepted that the third step relied upon (the role that became available in September 2021) if found to be a failure to make a reasonable adjustment was in time. The issue was in respect of the two roles from 21 and 29 April 2021.

Submissions regarding time bar

128. The claimant contended that the date upon which she ought to have known that the respondent was not going to provide the jobs applied for in April 2021 was 15 July 2021 following the email she received. The respondent argued the claimant ought to have known she had been unsuccessful for the two roles she applied for in April 2021 on 9 June 2021 which was when the claimant

emailed HR saying that she had been told of the decision not to progress her for interview. The parties accepted that the claims were in time if the relevant date was 15 July 2021.

Discussion and decision on time bar

- 5 129. While the claimant had been told that she was not being progressed for interview on 9 June 2021, she specifically said that she strongly disagreed with the decision and asked for matters to be reconsidered. The HR partner who replied to her email on 10 June 2021 stated that the matter was being escalated and asked for it to be resolved prior to other candidates being considered. It was clear that the claimant was told the respondent was to reconsider the decision not to appoint her to the roles. The claimant was told that the decision was final on 15 July 2021 when the claimant was told the process that was followed was not being altered.
- 10
130. Applying the legal test, the relevant date for the purposes of time bar is therefore 15 July 2021 since that was the date when it was clear that the respondent was not going to offer the claimant the two roles in question (and did an act inconsistent with making the adjustment). Had the discussion ended on 9 June 2021 that would have been the relevant date but the context of the subsequent communications made it clear that a final decision had not in fact been taken (until 15 July 2021 when the position was made clear).
- 15
- 20
131. Given early conciliation lasted from 13 October 2021 until 23 November 2021 (41 days) and the claim form was presented on 22 December 2021, the claim was raised in time. This is because the original time limit (3 months after 15 July 2021, 14 October 2021) would have expired during the period when early conciliation commenced (13 October 2021) and receipt of the certificate (23 November 2021). The time limit in this case therefore expires one month after the date the claimant receives (or is deemed to receive) the certificate, ie one month after 23 November 2021. Raising the claim on 22 December 2021 renders the claim in time. The parties had agreed that if the time limit ran from
- 25
- 30 15 July 2021 the claims were raised in time.

132. The Tribunal did not uphold the respondent's agent's argument that the email of 9 June 2021 was the relevant date for the purposes of time bar. The respondent had made it clear that they were going to reconsider their decision and raise the matter before considering any other candidates. On a fair reading of the correspondence the claimant was asking to be considered for both roles and the respondent indicated it would do so.

133. Had the relevant date been 9 June 2021, the Tribunal would have found that the claim was raised within such further period as was just and equitable given the issues the claimant had faced and her disability. Ultimately it was clear that a fair hearing was still possible and there would have been significantly greater prejudice to the claimant than to the respondent.

134. Each of the claims was therefore raised within time and no time bar issue arose.

Did the respondent apply the provision, criterion or practice (PCP) to the claimant of requiring her to carry out the full duties of a Scene Examiner role?

135. The respondent conceded that there was a PCP (the requirement to carry out the full duties of Scene Examiner, namely attending major and minor scenes, attending court, conducting post mortems and office work). It was also accepted that the PCP was applied to the claimant.

Did the PCP put the claimant at a substantial disadvantage compared with someone without the claimant's disability, in that it placed her at greater risk of absence and dismissal?

136. It was also conceded by the submissions stage that the PCP did put the claimant at a substantial disadvantage compared to those who were not disabled in that the claimant's disability made it more difficult for her to attend crime scenes (and do other tasks) which thereby placed her at risk of capability processes (which could ultimately lead to her dismissal).

Did the respondent know, or could it reasonably have been expected to know, that the claimant was likely to be placed at that disadvantage?

137. It was not disputed that the respondent knew of the disadvantages to which the claimant was subject and the key issue in this case was the
5 reasonableness of the steps being suggested.

What steps could have been taken to avoid the disadvantage? The claimant suggested appointing her to one of three alternative roles, without competitive interview:

- i. **Quality Lead with a closing date of 21 April 2021;**
- 10 ii. **Scene Examination Lead with a closing date of 29 April 2021; and,**
- iii. **Quality Lead (a similar role to (i) above) with a closing date some time in September 2021.**

Introductory submissions on the general position

138. The claimant's position was that she was not fit to carry out her role and that
15 the 2 separate roles for which she applied (one of those, the Quality Lead being a role for which she applied on 2 separate occasions) were roles that she believed she could have undertaken and it would thereby have been reasonable to have provided to the claimant. The respondent's position was that the roles were beyond the claimant's skills and competencies. The
20 respondent's position was that the claimant did not possess the essential skills and given her medical position and as such it would not have been reasonable to have given the claimant either role.

139. The claimant's agent argued that the burden of proof lies with the respondent to show that it was not reasonable for the adjustments to be provided. The
25 claimant's agent contended that the respondent had not discharged the burden.

140. The question as to whether or not the steps proposed were reasonable is an objective question. The claimant argued that the evidence before the Tribunal should allow the Tribunal to find objectively that the claimant was suitable for

these roles. It was argued that it cannot be said to be unreasonable for the claimant unless specific occupational health input was obtained for each role and a specific discussion with the claimant should have taken place to discuss the position with her prior to making a decision. It was submitted that in not
5 doing this, the Tribunal should apply the positions set out in **Latif** and find that the respondent failed to provide reasonable adjustments that it ought to have reasonably made.

141. The respondent's agent accepted that where an employee is unable to continue in their current job as a result of a disability, the duty to make
10 reasonable adjustments will often extend to taking positive steps to facilitate the employee's redeployment or transfer to a new role but that does not mean, however, that employees should be given favourable treatment in the sense of promoting them to jobs beyond their qualifications or experience. It depends on the circumstances and the question of reasonableness.

15 142. The respondent's agent argued that as established in **Wade v Sheffield Hallam University** EAT 0194/12, it is not reasonable adjustment simply to appoint an employee to a role for which they are not suitable.

143. The test of reasonableness is an objective one. The reasonable adjustment provisions are concerned with practical outcomes and the focus must
20 therefore be on whether the adjustment itself can be considered reasonable rather than on the reasonableness of the process by which the employer reached the decision about the proposed adjustment. It was submitted that throughout these proceedings, the claimant focussed on the reasonableness of a process (for example, offering training, obtaining another occupational
25 health report). Not only is the 'reasonableness' of the process absent from the ET1/notice given to the respondent but it was said not to be relevant to determining the claim.

144. The respondent denied that appointing the claimant to one of the alternative roles was a step the respondent should reasonably have taken to avoid the
30 suggested disadvantage suffered by the claimant as the claimant did not have the experience to render the step reasonable.

Decision and discussion as to reasonable steps

145. It is necessary to consider the roles in question and assess, objectively, whether providing the claimant with the roles would have amounted to a reasonable step on the facts. The Quality Lead role was the same role in both April and September and will be considered first. There was no suggestion the claimant's position had materially changed between April and September or that there were any other relevant and material factors that distinguished the position in respect of the roles at the relevant time. The Quality Lead role was essentially the same in both situations (as was the claimant's position) and will be considered as such.

146. The role of the Tribunal is not to assess the procedure and whether that was fair but assess the roles and the claimant's position and determine whether it would have been reasonable for the respondent to have offered the claimant either role, as a step which was reasonable to take to remove the substantial disadvantage the claimant suffered. To do so, it is necessary to consider the roles and their context together with the claimant's position and the information that the respondent had at the time.

Quality Lead Role – April and September vacancies**Submissions**

147. The claimant argued that the sole reason the respondent gave for not giving the claimant either of these roles was that they felt she did not have the experience of the Quality Management System. It was submitted that the claimant had provided extensive evidence as to how she fitted the essential criteria of the role. The claimant's agent argued that the respondent failed to treat the claimant more favourably as required. It was argued the respondent made broad and sweeping comments about training and resources but there was a lack of detailed evidence. The absence of a trial run meant it was not known how much training the claimant needed.

148. It was submitted that had the respondent spoken to the claimant it would have been clear that she did meet the essential criteria and the respondent cannot

possibly show that they carried out a proper assessment and as such failed to give the claimant the two roles she ought reasonably to have.

149. The Tribunal was invited to reject the respondent's position that the quality lead requires external experience as part of the essential criteria. It was submitted that nowhere in the essential criteria does it say that and further, if this was the position the role would not be advertised internally.

150. The claimant's agent concluded by submitting that the Tribunal should find that objectively the claimant could be given this role based on the following factors:

- 1) The respondent accepted she met all the essential criteria bar one;
- 2) The claimant worked with the quality management system on a daily basis;
- 3) The claimant attended training on the quality management system;
- 4) The claimant used the quality management system to create content training material and therefore had an in depth understanding;
- 5) The claimant was able to use the system to raise change request and assist in redrafting procedures;
- 6) It takes anyone coming into the role 12 months to get up to speed;
- 7) The claimant did not sign off on procedure simply because it was not her job to do so. This is entirely different to not being capable of doing so; and
- 8) Individuals with the very similar back had previously been appointed to the role.

151. The respondent's agent submitted that the role required candidates to have "extensive relevant quality management system knowledge and experience". The role was of particular significance given both the importance of providing quality forensic science services and the need to secure appropriate

accreditation. A failure to secure such accreditation could materially impact on, or even stop, the ability to provide forensic science services.

152. The respondent's agent noted that the claimant's application form did not contain any information to suggest that she had "extensive relevant quality management system knowledge and experience." Whilst as a Scene Examiner, the claimant had experience of working within the respondent's quality management system, which involved following process and procedure rather than implementing and development of a quality management system. As the claimant did not have an in depth knowledge of quality management systems or any practical experience of implementing these it was not reasonable to appoint her to the role of Quality Lead.

153. Further, the Quality Lead role was not a role in which an extended internal or external training programme could be put in place without having a real impact on the ability of the quality department to meet the requirements of the respondent. The respondent had a small team and any one post being in training for a significant period would have a detrimental impact on the team to operate effectively. Not only would the claimant in training be unable to complete full duties, other members of the team would have to reduce time spent on their own duties to provide training.

154. The respondent's agent disputed that there were broad or sweeping statements and the position was based on knowledge and experience.

155. It was also noted that the claimant as a disabled person was given preferential treatment. If the claimant met the essential criteria for the role, she would have immediately been offered an interview. The reason she did not progress to interview was because she did not meet the essential criteria.

Decision and discussion as to reasonableness of Quality Lead role

156. The Tribunal considered the parties' submissions in detail and analysed the evidence that was presented. The Tribunal was satisfied that the role of Quality Lead that the claimant argued was reasonable to provide to her was a key role for the respondent. The role reasonably required as an essential

prerequisite, extensive relevant quality management system knowledge and experience. Given the nature and importance of the role, it was reasonable (and necessary) for this to be the case.

- 5 157. While the claimant genuinely believed she had relevant experience, the nature of her experience was fundamentally different from the experience needed in this role. Her experience was naturally in relation to the systems on which she worked in her role. That involved using the systems but in a totally different way from that needed.
- 10 158. The Tribunal was satisfied that the experience the claimant had was such that it would not have been reasonable for the respondent to have given her the role. The process had been adjusted to allow all disabled candidates who had the essential experience an interview. The claimant did not have the experience to allow her to carry out the role.
- 15 159. This is not an unfair dismissal claim and the question is not whether the procedure that was adopted was fair or not. Instead the question is whether or not it would have been reasonable for the respondent to have taken the step of giving the claimant the Quality Lead role to remove the disadvantage the claimant suffered. The Tribunal upholds each of the respondent's submissions which have merit. It would not have been reasonable, objectively
20 viewed, for the respondent to have done so. The Tribunal was satisfied that the role required significant experience which the claimant did not possess and it would not be (objectively) reasonable to have given her that role.
- 25 160. Looking at the evidence, it would not have been reasonable to have offered a trial basis for the role or to have sought to provide the claimant with training (or a trial period) to allow her to acquire the experience. The nature of the role and the team was such that the role required the job holder to "hit the ground running". It would not have been reasonable to have reduced the available resources by investing in training and time given the nature of the team. The Tribunal accepted the evidence of Ms Douglas given her expertise in that
30 regard. Her evidence was compelling.

161. The successful candidate had relevant experience from a previous career. The claimant did not.
162. The Tribunal did not consider it correct to say that an adjustment can never be shown to be reasonable if occupational health has not been specifically engaged and a discussion does not take place with the individual. There may be some cases where that is so but each case requires to be considered on its merits. The assessment as to reasonableness is based on the information that was available at the time. It may well be possible to assess whether or not the step would have been reasonable from information that existed at the time such that occupational health input and detailed discussion with the individual was not needed. Each case would have to be decided upon the information available at the relevant time.
163. The Tribunal examined all the evidence the claimant led. The Tribunal was satisfied her experience was not such as to make it reasonable for her to be given the role. The Tribunal found Ms Douglas's evidence to be compelling.
164. The claimant was given the opportunity to providing the respondent with all the evidence she wished to show that she had the relevant experience. That was fully considered by the Tribunal. She argued that she had additional information which she had failed to include in her application form but would have provided had she been asked to do so, which the Tribunal examined. The Tribunal considered all the information the claimant provided and was satisfied that information would not have changed the respondent's conclusion or the facts. The role required a level of knowledge and experience that the claimant did not possess and in the circumstances, it would not have been reasonable to have provided training or a trial period given the nature of the role and the relevant context.
165. Finally seeking the involvement of occupational health with regard to the specific role would not have assisted. The barrier to the claimant being provided with the quality lead role was not related to any medical or health issue but the fundamental requirements of the role. The claimant did not have

the basic level of experience that was needed for the role, irrespective of her health position.

166. The Tribunal carefully considered the submissions of the claimant's agent but did not uphold them. The claimant's agent was correct to note that the respondent was not satisfied the claimant met all the essential criteria since the claimant was not found to have had the relevant experience needed to allow her to be given the role. The Tribunal found that evidence led by the respondent compelling and accepted it.
167. The Tribunal did take account of the claimant's experience and that she worked with the quality management system on a daily basis and had attended training on the quality management system and used the quality management system to create content training material. That was a fundamentally different type of knowledge and experience that the post in question needed. The claimant was able to use the system to raise change request and assist in redrafting procedures but she did not have the necessary substantive experience as set out above that the role required. It was a management role which required significantly different knowledge and experience of the systems from that possessed by the claimant.
168. The Tribunal took into account that any new member of staff would take time to get up to speed but without the essential knowledge and experience it was not reasonable to have expected the respondent given the nature of the team in question and the context to embark upon the necessary training to equip the claimant with the skills and experience. The Tribunal accepted that to do so would not have been reasonable.
169. The Tribunal also took into account that the claimant did not sign off on procedure because it was not her role but she did not have experience of so doing. It was undoubtedly something she could have learned but it was not reasonable in the circumstances of this case for the respondent to have done so given the nature of the team and issues arising.
170. The final point relied upon by the claimant's agent was that individuals with the very similar background had previously been appointed to the role. There

was little evidence before the Tribunal as to the similarity of the successful candidate with the claimant and it was not fair to say the successful candidate was “very similar” to the claimant. The focus was in relation to the claimant and her position and background, The successful candidate had acquired quality experience from another career. The claimant did not have that experience.

5

171. In reaching its conclusion the Tribunal considered each of the factors set out in the Code in deciding as to whether providing the claimant with the role was a reasonable step to take to remove the substantial disadvantage.

10

172. The first factor was whether taking the step would be effective in preventing the substantial disadvantage. There was no suggestion that the Quality Lead role would impact upon the claimant in any adverse way. Providing the claimant with the role could prevent the disadvantage and the Tribunal took this into account in assessing the reasonableness of the step.

15

173. The second factor was the practicality of the step. The Tribunal did not consider it practicable to provide the claimant with the role given the fact, objectively viewed on the facts, the claimant did not possess the essential experience that was necessary and it would not have been reasonable for the respondent to have provided the necessary training to acquire the skills and experience (given the context, work and team involved).

20

174. The third factor was the financial and other cost of making the adjustment and any disruption. There were no financial barriers with regard to this role. The disruption that would have arisen would be the impact upon the respondent having to equip the claimant with the necessary skills and experience to carry out the role, which would impact upon the respondent and its ability to deliver the services required. The claimant’s lack of experience and the nature of the team and work it undertook were considered in the balancing act.

25

175. The fourth factor was the extent of the employer’s resources and there were no issues as to resources. Similarly there were no issues as to financial and other assistance.

30

176. Finally the Tribunal took into account the type and size of the employer in reaching its decision.

177. The Tribunal took a step back, applying the factors set out in the Equality and Human Rights Code to assess whether providing the claimant with the Lead Quality role would have been a reasonable step to take to remove the disadvantage the claimant suffered, deciding the matter objectively and assessing the circumstances of this case. The Tribunal took into account the full submissions of the claimant's agent and the evidence led before the Tribunal (both orally and in writing). The Tribunal carefully considered the evidence objectively and concluded that for the above reasons it would not have been a reasonable step for the respondent to have taken to have provided the claimant with this role.

178. In all the circumstances it would not have been reasonable for the respondent to have given the claimant the Lead Quality role, whether on a trial basis or otherwise, whether in April or September.

Scene Examiner Lead role

Submissions

179. The claimant's agent argued that it would have been reasonable to have given the claimant this role given she did have had extensive project work experience and so the Tribunal can find that objectively the claimant was suitable to carry out this role and did meet the essential criteria.

180. It was argued that the other reasoning for the respondent not giving the claimant the role was "entirely created for the purposes of this hearing". The respondent made judgements on issues that he was inherently not qualified to make and at times were in contradiction to the opinions of a medical professional who is qualified to make these assessments. If the respondent genuinely had the concerns at the time of making the decision, occupational health could have considered the matter. The respondent chose not to seek such evidence.

181. It was submitted that Mr Scrimger had exaggerated the position and the claimant could easily have secured the relevant competencies.

182. Based on the evidence, it was argued that the Tribunal should make an objective finding that this role was suitable based on the following factors:

- 5 1) The claimant had 15 years of scene examination experience;
- 2) The respondent accepted that the claimant met all the essential criteria with the exception of project work;
- 3) The claimant clearly evidenced extensive project work experience which has not been disputed by the respondent;
- 10 4) The claimant's clinical psychologist was supportive the claimant applying for this role;
- 5) A level 2 Scene Examiner who was appointed to the role. It was therefore clear they had the same or very similar experience to the claimant;
- 15 6) The claimant would have very quickly got all her competencies back, has she had done on 2 previous occasions when off on maternity leave;
- 7) The occupational health report stated that training was not a trigger for the claimant; and
- 20 8) The respondent had no medical evidence to say that appointing the claimant to this role would have been detrimental to her wellbeing.

183. The respondent's agent disputed the claimant's agent's assertions. With regard to the argument that Mr Scrimger's evidence was "entirely created for the purpose of this hearing", the claimant's agent gave no reason why she believes it was 'created'. It was submitted this vague and unfounded statement suggested by the claimant should be given no weight.

184. The respondent's agent also argued that the suggestion the respondent should have referred the claimant back to occupational health to consider the

role was a completely new allegation for which no notice has been given. The occupational health report the respondent had said the claimant was not fit for her role and that it was reasonable foreseeable that it would re-trigger her PTSD. That was received by the respondent on 22 April 2021. The claimant applied for the role on 29 April 2021. Accordingly, the occupational health reports relied on were not outdated. In any event, later reports were not supportive of the claimant being offered the Scene Examination Lead role. The report of 23 June 2021 said that 'if possible the claimant should be redeployed out with the whole department'.

5
10 185. The respondent's agent also noted that the claimant's suggestion that her "psychologist indicated that they would be supportive of the application for the Scene Examination Lead role" was not supported by any medical evidence and in fact completely contradicts what she during a meeting in July 2021. Thus it was argued that if her psychologist was not likely to agree a return to scene examination as a level 1, it was extremely unlikely that they would ever regard her as being suitable for the Lead Scene Examination role, which oversees level 1's and is required to carry out similar duties to maintain competence. The contradictory suggestions posed by the claimant in relation to her being suitable to do the Scene Examination Lead role should be given no weight by the Tribunal. It was argued that even if it was the psychologist's view that the scene examination lead role was suitable (which was denied) then the psychologist provided no evidence to support that. This was, it was submitted, the claimant's opinion. In any event a psychologist is not an expert in Scene Examination. How could they be supportive of the role when there was no evidence they knew exactly what it entailed.

15
20
25

186. The Scene Examination Lead role required a full forensic service, including attendance at volume (minor) and serious (major) crime scenes. It was a fundamental aspect of the role of a Level 2 Scene Examiner and a Scene Examination Lead to attend both volume and serious scenes and also to be in an environment that contains content concerning both. The occupational health reports (namely, the reports on 16 April 2020, 25 March 2021 and 23

30

June 2021) were not supportive of the claimant carrying out the role of Scene Examination Lead.

187. The claimant applied for the role of Scene Examination Lead on 29 April 2021. Very shortly before that, the respondent received an occupational health report on 22 April 2021 which stated that the claimant was permanently unfit for her current post (which was a Level 2 scene examiner) and the claimant's psychologist was clear that she should not go back to her job as a Level 2 Scene Examiner as it represented a reasonably foreseeable risk/trigger for her PTSD. It was submitted that if the claimant was unable to perform the role of Level 2 Scene Examiner, then she was also unable to also perform the role of Scene Examination Lead. Both roles overlap, there being a requirement to attend and work with content surrounding minor and major crime.
188. There was no need for further medical input given an updated report was received a week before the claimant applied for the role, which report was not supportive in giving the claimant the role.
189. Even after the claimant was unsuccessful on 9 June 2021, a later occupational health report of 23 June 2021 still indicated that the Scene Examination Lead role was not suitable for the claimant. As can be seen in the occupational health report dated 23 June 2021 it is stated that if possible the claimant should be redeployed out with the Scenes Department.
190. The respondent's agent concluded by arguing that appointing the claimant to the role would not have avoided or alleviated the alleged disadvantage suffered by the claimant, namely absence and risk of dismissal.

Decision and discussion as to Scene Examination Lead

191. In reaching its decision the Tribunal carefully considered the evidence led by the parties and their submissions. The Tribunal considered that the respondent's agent's submissions had merit and upheld them.
192. The medical evidence available to the respondent at the time the vacancy arose was clear that the claimant was permanently incapable of carrying out her then role. The risk of triggers for her PTSD was great given the impact

visits to crime scenes could have (in certain cases). While that position may have changed by the date of the Hearing, at the time the vacancy arose, the medical position was clear. There was no need for further medical information given the clear position that had been provided.

5 193. While the claimant argued attendance at crime scenes may have been less
in the Lead role, compared to her existing role, the evidence was that such
attendance could not be avoided. The lead role required the post holder to
lead by example, attend the relevant scenes and react accordingly. There was
no evidence that suggested attendance would be materially less or (more
10 importantly) the chance of relevant triggers for the claimant would be
diminished. It would not be possible to foresee the particular scenes to which
the postholder would be directed or require to lead upon (whether in person
or when directing other colleagues). Given the claimant's position with regard
to attending such scenes and the risk of triggers in light of her PTSD, it would
15 not have been reasonable for the claimant to have been given the lead role.

194. The claimant's agent emphasised that that the crux of this issue was whether
or not it would have been reasonable to have offered the claimant the role. It
was accepted that the claimant was permanently unfit to carry out her original
role but the claimant's agent argued the respondent should have properly
20 assessed whether or not the claimant could have undertaken the lead role
and that was a medical matter that required medical input. The Tribunal
considered this in detail. Whether or not it would have been reasonable
depends upon the information that was available at the time. The medical
evidence before the respondent clearly supported the respondent's position.
25 The claimant continued to be unfit to carry out her role permanently. The
evidence was such that she was equally unlikely to be able to carry out the
Lead role given the nature of the role. The medical evidence that was
available at the time showed that placing the claimant in such a situation
created a risk. It is notable that the role secured for the claimant was a role
30 that could be adjusted to ensure attendance at crime scenes was avoided.

195. The Tribunal considered the claimant's agent's submissions carefully but did
not uphold them. The claimant had 15 years of scene examination experience

but that did not of itself render it reasonable for the claimant to be given the lead role particularly in light of the medical position.

196. Further as the claimant's agent noted, the respondent was not satisfied the claimant met all the essential criteria given their view of the claimant's project management experience. The claimant had evidenced some project work experience, but that did not change the position given the nature of the work and its context.
197. The Tribunal also took into account that the claimant had indicated her clinical psychologist was supportive of the claimant applying for this role but there was no evidence as to what the psychologist knew of the role nor was there any suggestion that the claimant's health had materially changed. On the contrary the claimant accepted that she was still unable to visit certain types of crime scenes given the triggers that could arise. This role could not reasonably be adjusted to avoid such an occurrence and she was highly likely to be in a similar position to that in her then current role, which she accepted she was permanently incapable of carrying out.
198. The Tribunal also took into account that a level 2 Scene Examiner had been appointed to the role but it is not correct to say that the successful candidate "had the same or very similar experience to the claimant". There was no evidence before the Tribunal as to the qualities or experience of that individual. In any event the issue for the claimant was the medical position that had been set out in the reports the respondent had at the time.
199. The claimant's agent also referred to the claimant's competencies. The Tribunal was satisfied that the issue with regard to the Lead Scene Examination role was not about the claimant's competencies nor her absence given she had done so on 2 previous occasions but the issue was in connection with the triggers and her disability which was unrelated to her competencies.
200. The claimant's agent was correct to note that training was not a trigger for the claimant but the trigger was an exposure to certain incidents that could be

found at crime scenes. The Tribunal accepted the respondent's evidence that it was not possible to avoid such a risk in the role.

201. The final point made by the claimant's agent was that the respondent had no medical evidence to say that appointing the claimant to this role would have
5 been detrimental to her wellbeing. The medical evidence that the respondent had made it clear that the respondent was permanently incapable of carrying out her then role and she should not work in an enjoyment where the triggers may be present. It was clear that the same triggers she could experience in her then current role were likely to exist in the Lead Role. It was not possible
10 for the Lead Role to be adjusted to remove that risk. The medical position was clear and equally as applicable to the Lead Role.

202. In reaching its conclusion the Tribunal considered each of the factors set out in the Code in deciding as to whether providing the claimant with the role was a reasonable step to take.

15 203. The first factor was whether taking the step would be effective in preventing the substantial disadvantage. The Tribunal was of the view that providing the claimant with the role would not have removed the disadvantage suffered by the claimant. Given the role required attendance at crime scenes (major and minor) and required the post holder to lead in that regard, it was more likely
20 than not that the same challenges the claimant encountered in her then current role would have emerged in the new role. In other words, it is likely that the claimant would have found it difficult to attend work given the risk of exposure to the triggers that affected her adversely. Such exposure was not something that could easily have been minimised given the nature of the role.
25 It was likely therefore that the role would have led to the claimant being put at the same disadvantage to which she was put as a result of being required to carry out her Scene Examiner role.

204. The second factor was the practicality of the step. Providing the claimant with the role would not have been practicable given the claimant's position, the
30 medical issues she faced and the nature of the role, which gave rise to

situations (which could not be foreseen) that could engage the triggers that would affect the claimant.

205. The third factor was the financial and other cost of making the adjustment and any disruption. There were no financial barriers with regard to this role. The
5 disruption that would have arisen would be the impact upon the respondent and claimant if the role (as was likely) gave rise to a situation which engaged the claimant's triggers. That would have an impact upon the claimant and respondent.
206. The fourth factor was the extent of the employer's resources and there were
10 no issues as to resources. Similarly there were no issues as to financial and other assistance. The issue in this case was principally the medical position.
207. Finally the Tribunal took into account the type and size of the employer in reaching its decision.
208. The Tribunal took a step back, applying the factors set out in the Equality and
15 Human Rights Code to assess whether providing the claimant with the Lead Crime Scene role would have been a reasonable step to take to remove the disadvantage the claimant suffered, deciding the matter objectively and assessing the circumstances of this case. The Tribunal took into account the full submissions of the claimant's agent and the evidence led before the
20 Tribunal (both orally and in writing). The Tribunal carefully considered the evidence objectively and concluded that for the above reasons it would not have been a reasonable step for the respondent to have taken to have provided the claimant with this role.
209. In all the circumstances it would not have been reasonable for the respondent
25 to have given the claimant the Lead Scene Examiner role.

Conclusion

210. As the steps advanced by the claimant were found objectively not have been reasonable steps on the facts, the claims are ill founded and are dismissed.

5 Employment Judge: David Hoey
Date of Judgment: 15 June 2022
Entered in register: 15 June 2022
and copied to parties